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No. 89-589

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

CBS INC.,
Petitioner,

vs.

MARTIN W. BERDA AND LINDA BERDA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
MICHAEL A. CURLEY

O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York 10022-4611
(212) 326-2000
Attorneys for Amicus Curiae,
Merchants and Manufacturers Association

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MOTION OF MERCHANTS AND MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Merchants and Manufacturers Association (the "Association") moves the Court for leave to file the attached brief of amicus curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

I

NATURE OF THE INTEREST OF THE MERCHANTS AND MANUFACTURERS ASSOCIATION

The Association is a non-profit California corporation. Its purpose is to augment the human resources management of member firms. Over 3,700 companies of varying sizes and industries are members of the Association. The members collectively employ over one million employees.

Many of the Association's members are parties to collective bargaining agreements with labor unions. It is of especial concern to the Association's members that courts eschew rulings that would permit union employees to rely on individual employment agreements which are contrary to the terms and conditions negotiated by the union representative in the collective bargaining process. In addition, the Association's members believe it is crucial that courts preserve established federal labor law policy which mandates that claims such as respondent's be resolved through the arbitration and grievance procedures agreed to by the parties to the collective bargaining agreement, rather than through state court actions. It is equally important to the members of the Association that clear and uniform federal law be applied to interpret and enforce collective bargaining agreements.

II

ISSUES TO BE ADDRESSED BY THE ASSOCIATION

The decision below bears significantly on all of the above precepts of federal labor policy. The legitimacy of that decision turns on an employee's power to circumvent the terms set forth in a collective bargaining agreement

and to negotiate and retain the benefit of individual agreements, despite the extraordinary preemptive force of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301"). The Association's brief addresses the conflict among several circuit courts of appeals which have ruled variously on similar facts, examines the failure of the court below to adhere to this Court's authority, and discusses the practical effect of the rule adopted below in the negotiation and administration of a collective bargaining agreement.

The Association submits that its experience in labor related matters, as well as its appearance as amicus curiae in pertinent forums, including an appearance before this Court in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), gives it the unique ability to focus on the long term impact of the decision below on federal labor policy. In addition, the Association is able to develop more fully the consequences of the lower court's decision on large and small employers alike, in particular, the difficulty of administering a collective bargaining agreement if various state laws are deemed to abrogate it and the unattractiveness of agreeing to a labor contract containing grievance and arbitration provisions which are easily circumvented.

For the foregoing reasons, the Court should grant this Motion for Leave to File Brief of Amicus Curiae in Support of the Petition for Writ of Certiorari.

Dated: November 13, 1989.

Respectfully submitted,

CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
MICHAEL A. CURLEY

O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York 10022-4611
(212) 326-2000

Attorneys for Amicus Curiae, Merchants and Manufacturers Association

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BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DESCRIPTION OF INTEREST OF AMICUS CURIAE

The Merchants and Manufacturers Association ("the Association") adopts the statement made in the Motion for Leave to File Brief, immediately preceding this brief, as the description of the interest of amicus curiae.

CONSENT OF PARTIES

Respondents to this action refused consent to the filing of this brief by the Association. A motion for leave to file this brief is attached. Petitioner has consented to the filing of this brief and written consent will be filed concurrently.

STATEMENT OF THE CASE

The Association adopts the Statement of the Case set forth in the Petition for Writ of Certiorari, as well as Petitioner's description of the Opinions Below, Jurisdiction, Statutory Provisions and the Questions Presented.

ARGUMENT

I.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICT REGARDING THE SCOPE OF SECTION 301 PREEMPTION OF STATE LAW CLAIMS.

A. Preliminary Statement.

The court below held that state law causes of action for breach of contract and fraud, brought by a union employee who was laid off in a company-wide reduction in force, were not preempted by Section 301 of the Labor

Management Relations Act, 29 U.S.C. § 185 ("Section 301").[1] The Third Circuit's decision ignores the fact that the gravamen of respondent's complaint is that he was wrongfully discharged from a collective bargaining unit position — a claim long recognized as one arising under Section 301 and one subject to grievance and arbitration if (as here) the labor contract contains such provisions. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In a decision at odds with this Court's case authority and the law of other federal circuit courts of appeals, the court below determined that respondent's purported individual pre-hire employment agreement had an existence independent of the collective bargaining agreement that governed the terms and conditions of his employment. The decision permits respondent to circumvent the grievance and arbitration provisions of his collective bargaining agreement by virtue of his allegation that prior to being hired by CBS as a union employee, various representations were made to him about job security and protection from layoffs — representations which were inconsistent with the collective bargaining agreement.

The resolution of respondent's claims depends on an interpretation of the labor contract which governed the terms and conditions of respondent's employment at the time of his layoff, because the court must look to the collective bargaining agreement to determine whether respondent justifiably relied on the purported individual promises and whether respondent can establish a valid oral or implied contract in the face of a contrary written agreement. Application of federal law to state law causes

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[1]The Association's brief addresses the claims of respondent Martin Berda only. Respondent Linda Berda's claim for loss of consortium is derivative.

of action which depend, for their resolution, on an interpretation of a collective bargaining agreement, is of vital importance to employers and unions alike, and is in accordance with the Congressional mandate that federal labor law be uniform in substance and consistent in application. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209-10 (1985); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

The decision below jeopardizes the continued uniformity and consistency in the application and interpretation of federal labor law. If the decision stands, pre-hire agreements will be subject to the inevitably inconsistent interpretation of some fifty jurisdictions. It will spawn countless lawsuits from disgruntled union employees unhappy with the terms of employment in their collective bargaining agreement and with the grievance and arbitration remedies contained therein. Because the decision below has a pervasive impact on the negotiation and administration of collective bargaining agreements and on employers, employees and labor unions nationwide, the Association urges this Court to grant certiorari in this matter.

B. The Decision Below Conflicts With Decisions Of Other Circuit Courts Of Appeals.

Two other Circuit Courts of Appeals have agreed with the court below that Section 301 does not preempt state law claims based on individual pre-hire agreements concerning a position covered by the collective bargaining agreement. *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987); *Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987). In each of these cases the court focused on the "non-union" status of the employee

at the time the alleged pre-hire promises were made, as did the Third Circuit below.

The Ninth and Fifth Circuit Courts of Appeals, however, have reached a conclusion opposite to the court's ruling below, finding that union status is immaterial when the job covered by a purported pre-hire agreement is governed by a collective bargaining agreement, and that claims such as respondent's are preempted by Section 301. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987); *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

In *Young*, the plaintiff, like respondent, brought state law contract and tort claims for an alleged breach of a pre-hire individual employment agreement. The plaintiff alleged she was promised her employment would be terminable only for just cause, a term inconsistent with the terms of the collective bargaining agreement which governed the post for which she was hired: the labor agreement provided that for the first thirty days employees were terminable at will. 830 F.2d. at 996. Defendant employer removed the action, plaintiff's motion for remand was denied and defendant's motion for summary judgment was granted. The Ninth Circuit upheld the trial court's dismissal of the action.

Although the plaintiff in *Young*, like respondent, contended that her pre-hire agreement was independent of the collective bargaining agreement, the Ninth Circuit noted that "[t]he subject matter of her contract, however, is a job position covered by the CBA. Because any 'independent agreement of employment [concerning that job position] could be effective only as part of the collective bargaining agreement,' the CBA controls and the contract claim is preempted." *Id.* at 997 (quoting *Olguin*

v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984) and citing *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1048 (9th Cir.), *cert. denied*, 484 U.S. 986 (1987) and *Bale v. General Telephone Co.*, 795 F.2d 775, 779-80 (9th Cir. 1986)).

The Ninth Circuit specifically noted that the situation there (and here) presented was in contrast to the facts in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), wherein a breach of contract claim *"concerning a job not governed by a collective agreement"* could be effective independent of the labor agreement and thus, not completely preempted. 830 F.2d. at 998 (emphasis added). Accordingly, the Ninth Circuit determined that Young's claim for breach of contract was an "artfully pleaded" claim for breach of the collective bargaining agreement, was properly removed, and cognizable, if at all, under Section 301.

The Ninth Circuit also determined that Young's state law tort claims for fraud and negligent misrepresentation were preempted by Section 301, whether or not they were also independently removable. Relying on *Lueck*, the court assessed whether the state " 'confers non-negotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.' " *Id.* at 999 (quoting *Lueck*, 471 U.S. at 213). The Ninth Circuit determined that to resolve fraud claims, resort to the collective bargaining agreement would be required, in order to determine if Young justifiably relied on oral representations significantly different than those set forth in the labor agreement. *Id.* at 1001. Accordingly, Young's claims for misrepresentation as well as her contract claim were preempted by federal labor law. *Id. Accord, Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d at 362-63

(union employee's state law claim for breach of pre-hire individual promise of "lifetime employment" was attempt to "limit or condition" terms in collective bargaining agreement contrary to rule of *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), and preempted by Section 301).

The conflict among the circuit courts of appeals is self-admitted; the courts have made no attempt to distinguish the facts of their respective cases in order to attenuate the obviously divergent outcomes. In *Young*, the Ninth Circuit acknowledged and refused to follow the contrary position of the Eighth Circuit in *Anderson*. 830 F.2d 997 n.1. In turn, the *Anderson* court acknowledged the Ninth Circuit's decision in *Bale* (that an alleged breach of pre-hire individual agreements which concern a job covered by the collective bargaining agreement is preempted by Section 301), and simply rejected it. 803 F.2d at 959. And the Third Circuit in the instant case began the first line of its opinion with its observation that the issue was "circuit-splitting." (A-2.) The court below discussed at some length the divergent paths followed by the various circuits, and concluded that "[o]n similar facts they reach different answers." (A-13.)

Thus, the circuit courts have consciously reached directly conflicting answers to the question of whether Section 301 preempts state law claims based on individual pre-hire agreements concerning jobs covered by a collective bargaining agreement. The Court should take this opportunity to resolve the conflict by granting certiorari.

C. The Decision Below Conflicts With Decisions Of This Court.

Section 301 confers original jurisdiction upon the federal district courts over "[s]uits for violation of contracts between an employer and a labor organization represent-

ing employees in an industry affecting commerce . . . ." The statute reflects both a grant of jurisdiction and a mandate for the development and application of federal substantive law in disputes over collective bargaining agreements. *Lincoln Mills,* 353 U.S. at 456.

In *Lueck,* this Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim (citation omitted), or dismissed as preempted by federal labor-contract law." 471 U.S. at 220. *See also Lingle v. Norge Division of Magic Chef, Inc.,* 108 S. Ct. 1877 (1988).

Respondent's state law contract and tort claims, if not outright Section 301 actions to enforce the terms of the collective bargaining agreement, indeed require analysis of the collective bargaining agreement in order to resolve them.[2] The Third Circuit's failure to find that the collective bargaining agreement was implicated by the state law claims stems, in part, from its refusal to consider that the

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[2]The allegations in respondent's complaint do, in fact, set forth an "artfully pleaded" Section 301 claim, which would independently support removal. Although details of this argument must await a brief on the merits, it is well established that the preemptive scope of Section 301 is "so extraordinary" that it " 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " *Caterpillar,* 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 65 (1987)). Respondent's claims, if cognizable at all, are Section 301 claims for breach of the collective bargaining agreement: an individual pre-hire promise concerning a position covered by a collective bargaining is effective only as part of the collective bargaining agreement. *See, Young,* 830 F.2d at 997. Whether Section 1.01 (set forth at A-27) of the labor contract at issue here permits modification by individual agreement is wholly a matter relegated, by agreement, to arbitration.

collective bargaining agreement, and, concomitantly, Section 301 preemption, would be implicated in defense of the state law claims, if not in the prima facie case. The court below failed to follow this Court's determination in *Lingle* that all elements of the state law claim, *including defenses,* are examined in a Section 301 preemption analysis, where, as here, removal jurisdiction is not at issue. The Third Circuit simply confused principles of removal jurisdiction pursuant to Section 301 with substantive preemption analysis.[3]

In *Lingle* (a case virtually ignored by the court below), this Court analyzed all elements of a plaintiff's claim of retaliatory discharge for filing a workers' compensation charge to determine if the state law claim was preempted. As in this case, removal was not at issue in *Lingle.* The

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[3]The Third Circuit failed to recognize that the *Caterpillar* decision on which it primarily relied was directed to issues of removal jurisdiction. The court below recognized that the propriety of removal in this case was not at issue: the case was removed on both federal question and diversity bases. (A-5.) Yet the court persisted in analyzing the case in accordance with the "well-pleaded complaint rule" set out in *Caterpillar.*

Although the "test" for Section 301 removal jurisdiction and substantive preemption follow the same principles (*see Lingle,* 108 S. Ct. 1881 n. 5), the analysis diverges on at least one crucial point overlooked by the court below. The Third Circuit interpreted *Caterpillar* to "hold" that the "possibility that a federal claim may be raised in the defense of a contract suit does not mean that the state contract claim is preempted under section 301." (A-15, n. 6.) The Third Circuit misread *Caterpillar.* Although this Court in *Caterpillar* disapproved of federal defenses — including Section 301 — as a basis of "complete" preemption (i.e. removal jurisdiction based on recharacterization of a claim as a Section 301 claim), it has *not* held that, ultimately, preemption cannot rest on a defense requiring interpretation of the collective bargaining agreement. The analysis in *Lingle* mandates just the opposite conclusion.

Court outlined the *Lingle* plaintiff's prima facie case, finding that none of the elements required a court to interpret any term of a collective bargaining agreement. The Court did not stop its analysis there.

> "*To defend against a retaliatory discharge claim,* an employer must show that it had a non retaliatory reason for the discharge, [citations omitted]; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement." 108 S. Ct. at 1882 (emphasis added).

Thus, in *Lingle,* although this Court found the claim for retaliatory discharge not preempted by Section 301, it did not reach that conclusion before an examination of both the prima facie case *and* defenses. The court below refused to even consider defenses, preoccupied with *Caterpillar's* mandate that removal jurisdiction be governed by the well-pleaded complaint rule. That rule has no application in a motion for summary judgment or judgment on the pleadings in a case properly removed. *Accord, Vacca v. Viacom,* 875 F.2d 1337, 1342 (8th Cir. 1989) ("The complete factual background of the case must be examined against all elements of the state law claim, *including defenses,* to determine whether the terms of the union contract 'come into play.' " (Emphasis added.)

Had the court below properly relied on and applied the tests set forth in *Leuck* and *Lingle* and examined *all* elements of respondent's state law claims, there would be no question that in this case the collective bargaining agreement is invoked by an essential element of each claim.

Under general state law principles of contract interpretation and proof in Pennsylvania, oral representations or implied agreements may not be considered by the courts

nor relied on by plaintiffs in the face of written agreements to the contrary. *Gagnon v. Speback,* 118 A.2d 744 (Pa. 1955). For example, in Pennsylvania an exception to the presumption that employment is at will results where the parties' conduct has resulted in an express or implied-in-fact agreement requiring just cause for termination. *Martin v. Capital Cities Media, Inc.* 511 A.2d 830 (Pa. Super. 1986) *Darlington v. General Electric, Inc.,* 504 A.2d 306 (Pa. Super. 1986). But a plaintiff may not circumvent express at will language in a written employment agreement by alleging representations or implied contractual terms to the contrary, and reliance on such contrary representations is unreasonable as a matter of law. *See Baker v. Lafayette College,* 504 A.2d 247, 254-55 (Pa. Super. 1986), *aff'd* 532 A.2d 399 (Pa. 1987); *Martin,* 511 A.2d at 838.

In accord with these state law contract principles, respondent has alleged several factors to support the allegation of an individual contract for continued employment, including oral reassurances of continued employment and financial security, and policies and practices of CBS which allegedly suggest CBS would only discharge respondent for cause and would protect him from layoff. (A-3.) Respondent mentions the collective bargaining agreement only in passing, alleging that his oral or implied individual contract was "supplemental" to the written labor contract.

Like the plaintiffs in *Baker* and *Martin,* respondent cannot ignore his written employment contract, i.e., the collective agreement between respondent and CBS, which defined the terms of respondent's employment relationship with respect to discharge, layoffs and job security. (§§ 2.05, 5.02-5.03) (A 29-31.) More importantly, Section 1.01 of the labor contract states that "[a]ny changes,

supplements or amendments made during the term of this Agreement must be reduced to writing, numbered serially, signed by the parties hereto . . . and then shall become a part of this Agreement." (A-27.) (Emphasis added.) Respondent cannot pick and choose among the circumstances of his employment relationship, simply because he wants to escape these terms of the collective bargaining agreement. A fundamental element in both respondent's prima facie case and CBS's defense of breach of contract will be an analysis of the collective bargaining agreement, in particular, Sections 1.01, 2.05, 5.02 and 5.03 and their preemptive effect on the purported individual promises. Because interpretation of the collective bargaining agreement is the exclusive province of the arbitrator, federal law should determine if respondent may assert a claim based on alleged independent oral promises concerning terms and conditions of employment which are subject to mandatory collective bargaining and which have been collectively bargained.

Similarly, in order to establish claims for misrepresentation, a plaintiff must demonstrate justifiable reliance. *Scaife Co. v. Rockwell-Standard Corp.*, 285 A.2d 451, 454 (Pa. 1971), *cert. denied*, 407 U.S. 920 (1972). Here, respondent is faced with oral or implied terms wholly contradictory to those in his "written" collective bargaining agreement. In *Martin*, the Pennsylvania court concluded that because

> "[a]ppellant had been hired as an at-will employee. . . . [w]e do not believe a reasonable person in the appellant's position would have read this handbook provision as converting her from an at-will employee to an employee with an indefinite contract who could never be discharged without objective just cause. We reiterate that there was already a contract

> between the appellant and the newspaper, the terms of which were that appellant could be discharged for any or no reason." 511 A.2d at 838.

In the instant case, the terms of the "written agreement," i.e., the collective bargaining agreement, must be analyzed under respondent's state law claim to determine if respondent's reliance on the purported individual representations was justifiable. Any analysis of the labor contract, of course, must be left to the arbitrator. More to the point, this Court has held that if resolution of the state law claim requires interpretation of the collective bargaining agreement, the state law claim is preempted by Section 301. *Lueck*, 471 U.S. at 220.

The court's error below was in relying almost exclusively on this court's decision in *Caterpillar*. In doing so, the court failed to account not only for the marked distinctions in the procedural posture of the two cases, but it also ignored marked factual distinctions. The *nature* of the promises allegedly made in *Caterpillar* had only peripheral connection to the collective bargaining agreement: plaintiffs in that case claimed they were told, as management employees, that they had " 'indefinite and lasting employment with the corporation.' " 482 U.S. at 388. And when they were downgraded to union positions they were told that the union assignments were only temporary. *Id.* at 389. The representations purportedly made to the *Caterpillar* plaintiffs did not implicate the terms of the collective bargaining agreement, because the breach there was in not affording plaintiffs their promised job security in management positions, not a breach of a term of employment specifically governed by the collective bargaining agreement. *Id.* at 395 n.9.

Here, by contrast, the purported representations concern the very terms and conditions of a *union* position, a

position governed by the collective bargaining agreement in place at the time the alleged representations were made. The Third Circuit failed to recognize a fundamental difference between a promise that placement in a union position itself will be temporary (*Caterpillar*), and a promise that a prospective union employee will enjoy job security and layoff protections other than those set forth in the pertinent collective bargaining agreement.

Finally, the Third Circuit's failure to distinguish *Caterpillar* stems largely from its short-sighted focus on the *timing* of the alleged pre-hire agreement, a focus shared by the Eighth and Eleventh Circuits.[4] (A-14.) However, based on this Court's authority, using union or non-union status as the fulcrum of a Section 301 preemption analysis is inappropriate. *See, e.g. Republic Steel,* 379 U.S. at 657 (former employee's severance pay claim preempted by Section 301). *See also J. I. Case Co. v. NLRB,* 321 U.S. 332 (1944) (individual contracts made prior to union representation deemed subsumed by collective bargaining agreement). This Court should grant the Petition for Writ of Certiorari not only to resolve conflict among the circuits but also to clarify misconceptions of its prior rulings evidenced in the decision below.

II

THE DECISION BELOW PRESENTS IMPORTANT ISSUES OF FEDERAL LAW.

The Third Circuit has not only issued a "circuit splitting" decision, but the rule espoused by the court below also seriously erodes fundamental precepts of federal labor policy. Employers and unions face the prospect that

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[4]See *Anderson,* 803 F.2d at 958; *Varnum,* 804 F.2d at 640.

protracted state court litigation over federal questions will become commonplace as a result of the decision below. It is a matter of some record that suits based on state common law for or related to "wrongful termination" are on the rise, and an entire new body of state law has developed which, in many jurisdictions, has eroded the traditional employment at will doctrine. *See* Lopatka, *The Emerging Law of Wrongful Discharge — A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law 1 (1984); Stieber, *Recent Developments in Employment at Will*, 36 Lab. L.J. 557 (1985).

Individual union employees, such as respondents, have not hesitated in their efforts to take advantage of these developments. In an attempt to divorce themselves from their collective bargaining agreement and the grievance and arbitration remedies provided therein, union employees have asserted causes of action for breach of purported "individual" employment agreements and related tort actions. Several federal courts have been forthright in rejecting a union employee's argument that his allegations of "individual" employment contracts provide him rights independent of the collective bargaining agreement. If the decision below stands, however, it is inevitable that numerous union employees, unhappy with their collectively bargained agreement, will seek to avoid the terms of their labor contract and the grievance and arbitration remedies negotiated therein by suing in state courts on the basis of "pre-existing" employment agreements.[5]

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[5]A recent search of published decisions of federal and state courts has revealed that since this Court's decision in *Lingle*, in 1988, no fewer than forty cases have been reported in which union employees have sought, with varying degrees of success, to avoid the terms of their collective bargaining agreements and litigate employment dis-

The threat of lengthy litigation, while troublesome, is perhaps not the most damaging effect of the Third Circuit's decision. The loss of the federal arbitration forum and substitution of state law gives rise to the possibility that individual contract terms might have different meanings under state and federal law, which would "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local v. Lucas Flour*, 369 U.S. 95, 103 (1962).

In *Lueck*, this Court recognized that a primary purpose of Section 301 preemption by the LMRA is to promote national uniformity in labor relations by preventing the various state courts from applying their own common law principles in the interpretation of collective bargaining agreements. 471 U.S. at 211-213. The opinion below undermines this paramount policy of federal labor law, because it allows precisely the kind of state law intervention eschewed by this Court in *Lueck*.

The decision below, and its inevitable effect of diminishing the role of the arbitrator in labor relations, presents squarely the specter of industrial strife envisioned in *Republic Steel*. In that case, a discharged union employee brought a state law breach of contract claim for severance pay pursuant to the terms of the collective bargaining agreement. Rejecting the state court view that federal labor law was inapplicable because, with the end of the employment relationship the threat of industrial strife had ended, this Court found the contract claim was, indeed, controlled by Section 301, and that the potential for strife survived despite the "non-union" status of the former employee. 379 U.S. at 657.

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putes via state law claims. There is a strong likelihood, of course, that the number of unreported decisions is legion.

> "Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship. Only in the situation in which no employees represented by the union remain employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a severance-pay claim. But even in that narrow situation, if applicable law did not require resort to contract procedures, the inability of the union and employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting effect on reaching an agreement." *Id.* at 656.

The Eighth Circuit's decision in *Anderson* clearly illustrates the threat to collective bargaining which is posed by the position of the Third, Eighth and Eleventh Circuits. Initially, the plaintiffs in that case did not bring a claim against the United Auto Workers International Union, the union which represented plaintiffs' bargaining unit. Later, however, the union was joined as a necessary party in order to protect non-plaintiff union employees, whose seniority rights were threatened by the plaintiffs' claim to "lifetime" employment based on statements of company representatives. 803 F.2d at 955 n.2. State law claims of this nature seriously interfere with the ability of labor and management to enter into binding agreements with respect to terms and conditions of employment.

And the Third Circuit's willingness to substitute state tort and contract law actions for grievance and arbitration remedies is contrary to congressional mandate. Not

only does the Third Circuit's rule foster abandonment of grievance and arbitration provisions by employees, the rule will also discourage employers, particularly small employers, from adopting such provisions in the first instance. Employers will likely refuse to agree to contract terms which enhance the prospect of litigating employment disputes in two forums. The Court in *Republic Steel* stated:

> "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. [citations omitted.] Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. Conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of

collective agreements.' *Teamster Local v. Lucas Flour Co.*, 369 U.S. 95, 103." 379 U.S. at 653.

This Court has previously recognized, then, that the questions presented by the decision below are substantial. It is essential that this Court reaffirm that the collective bargaining agreement is the sole source of a union employee's remedy for violations of negotiable terms and conditions of employment, that employees cannot rely on individual pre-hire agreements that concern the terms of a union position covered by a collective bargaining agreement, and that federal law is the sole regulator of the collective bargaining relationship.

CONCLUSION

For the foregoing reasons, the Association respectfully submits that this case presents a substantial federal question for this Court's review, that the decision below conflicts with this Court's and other circuit courts' authority and that, accordingly, this Court should grant the petition for writ of certiorari.

DATED: November 13, 1989.

Respectfully submitted,

CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
MICHAEL A. CURLEY
O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York 10022-4611
(212) 326-2000
Attorneys for Amicus Curiae, Merchants and Manufacturers Association

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On November 13, 1989, I served the within Motion for Leave to File Brief and Brief of Amicus Curiae in re: "CBS Inc. vs. Martin W. Berda and Linda Berda" in the United States Supreme Court, October Term 1989, No. 89-589, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Douglas P. Jacobs
Helen M. Gold
Anthony M. Bongiorno
CBS INC.
51 West 52nd Street
New York, New York 10019

Arthur J. Schwab
Mark A. Fontana
Reed Smith Shaw & McClay
435 Sixth Avenue
Pittsburgh, PA 15219

John D. Hendricks
Joseph J. Hinchliffe
Tarasi & Johnson, P.C.
510 Third Avenue
Pittsburgh, PA 15219

All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 13, 1989, at Los Angeles, California.

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